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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

JEWEL RICHARD BROWDER, *Petitioner*

v.

CYRUS R. VANCE, Secretary of the Army, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Jewel Richard Browder, the petitioner herein, by his attorneys, prays that a writ of certiorari issue to review the decision of the United States District Court of Appeals for the District of Columbia entered in the above cause on

September 20, 1963, refusing to allow petitioner herein an appeal from the judgment of the United States District Court for the District of Columbia, dated September 10, 1963, denying petitioner's motion for a three-judge court.

OPINIONS BELOW

The order of the United States Court of Appeals for the District of Columbia denying the application of the petitioner for permission to take an appeal is not yet reported, but is appended hereto (Appendix A, p. 1a).

The memorandum and interlocutory orders of the United States District Court for the District of Columbia are not yet officially reported, but are appended hereto (Appendix B, pp. 2a-5a and Appendix C, pp. 6a-7a).

The temporary restraining order of the United States District Court for the District of Columbia is not yet officially reported, but is appended hereto (Appendix D, pp. 8a-10a).

JURISDICTION

The order of the United States Court of Appeals for the District of Columbia was entered on September 20, 1963.

The temporary restraining order of the United States District Court was issued on August 30, 1963.

The interlocutory orders of the United States District Court for the District of Columbia were entered on September 10, and September 13, 1963.

The order of the Chief Justice of the United States restraining the defendants and granting petitioner thirty days in which to file this petition for certiorari was entered on September 30, 1963.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Should the Court of Appeals have granted petitioner's application for an interlocutory appeal under the provisions of Section 1292(b) of Title 28, United States Code?

2. Is a three-judge court necessary to hear petitioner's motion for a preliminary and permanent injunction?

3. Does a substantial question of constitutional validity arise from the language of Sections 3791 et seq. of Title 10, United States Code?

4. Assuming that a substantial question of constitutional validity does thus arise, is the Statute itself unconstitutional on its face?

STATUTES INVOLVED

The Statutes involved are:

United States Constitution
Amendments, Article V

United States Code:

5 U.S.C. 1006(e)
10 U.S.C. Chapter 360
10 U.S.C. Sections 3791 through 3797
28 U.S.C. Section 1254(1)
28 U.S.C. Section 1292(b)
28 U.S.C. Section 2282
28 U.S.C. Section 2284

The pertinent portions are either quoted in the text or set forth in Appendix G, pp.

STATEMENT

The petitioner is a Lieutenant Colonel in the Regular Army of the United States. He was ordered to be eliminated by involuntary retirement from the active list of the Regular Army by the defendant, Secretary of the Army, under the provisions of Section 3791 et seq. of Title 10, United States Code, on the grounds of moral dereliction.

The order was to be effective on August 31, 1963, but has been stayed pending appeal.

On January 26, 1962, the petitioner was acquitted by a General Court Martial of certain charges and specifications, which are appended hereto in the General Court Martial Order as Appendix E, pp. 14a-18a. Nevertheless, and not withstanding the said acquittal on all charges and specifications, the petitioner was advised that he would be required to show cause before a Board of General Officers, convened according to Title 10, U.S.C. 3791 et seq., why he should not be removed from the active list of the Regular Army on certain charges (Appendix F, pp. 19a-21a), arising out of the same investigations, reports and information upon which the charges and specifications, of which he was acquitted by the General Court Martial, were based.

The Board of Inquiry held a hearing on December 10-11, 1962, at which time petitioner was represented by counsel who protested the unconstitutionality of the Board and its proceedings. Prior to the hearing petitioner requested that some thirty witnesses, upon whose unsworn statements the Government's case was largely grounded, be called in order that they might be examined and confronted by the petitioner. Petitioner was advised that the Government refused to call twenty-two of the said witnesses, but would provide local transportation for the remaining if the defense made the necessary arrangements for their attendance.

The Board found that the petitioner had shown cause for retention as to the allegations of acts of personal misconduct and of conduct unbecoming an officer, but the Board found that the petitioner had not shown cause as to the allegation of intentional omission or misstatements of fact in official statements and records for the purpose of misrepresentation, and recommended that he be removed from the active list of the Regular Army basing its finding and recommendation on the following reasons and factual data:

(a) Unlawfully obtained payment of Basic Allowance for Quarters from Sept 1957 to about April 1960 during which period he was occupying adequate government family type quarters.

(b) On or about 24 Aug 1959 unlawfully caused travel orders to be issued for travel to Utica, N. Y. which orders were for his own personal benefit to permit collection of travel expenses from the government.

(c) On or about Nov 1959 on submission of a voucher received payment from the U. S. for a trip from Burlington, Iowa, to Joliet, Ill. the primary purpose of which was personal rather than official in nature.

(d) Submitted a travel voucher for TDY in Paris and Munich during the period 26 Aug to 8 Oct 1960 when travel to these cities was not authorized in his orders.

Two of the "reasons and factual data" repeat the same facts as are stated in the said General Court Martial Order No. 5, dated April 12, 1962, (Appendix E, pp. 11a-18a) as follows:

> Reason (a) above was covered by Specifications 1 through 19 of Charge I, of which charge and specifications the petitioner was acquitted.
>
> Reason (b) above was covered by Specification 2 of Charge II and by Specification 3 of Charge III, of which charges and specifications the petitioner was acquitted.

These findings were approved by the Army Board of Review for Elimination and by the Secretary of the Army who ordered the petitioner's involuntary retirement under the provisions of 10 U.S.C. 3791 et seq.

On August 29, 1963, petitioner filed his complaint, his motion for a preliminary injunction, and his motion for a

three-judge court, in the United States District Court for the District of Columbia, alleging that the statutes (10 U.S.C. 3791 et seq.), upon which his removal is predicated, are unconstitutional, in that they deprive an officer of the Regular Army of his office, his pay, allowances and perquisites thereunto belonging, without due process of law; in violation of the Fifth Amendment to the Constitution of the United States, in that the said sections provide for the elimination of an officer of the Regular Army from the Service for moral dereliction without any provision for confrontation or cross-examination of those persons making the derogatory accusations, and that, as construed and applied to the petitioner under the circumstances in the present case, the said sections are unconstitutional for the same reasons.

On August 30, 1963, the United States District Court for the District of Columbia, Judge Leonard P. Walsh, entered a temporary restraining order which stayed the removal of the petitioner in order to prevent irreparable injury to him, pending determination of the constitutional questions involved and in order to grant the petitioner a hearing on his motion to convene a three-judge court (Appendix D, pp. 8a-10a).

On Tuesday, September 3, 1963, and on Friday, September 6, 1963, Judge Walsh heard argument on petitioner's motion for a three-judge court and on defendants' motion to dismiss the complaint.

On September 10, 1963, Judge Walsh issued a memorandum and order, (Appendix B, pp. 2a-5a), (1) denying petitioner's motion to convene a three-judge court, (2) denying defendants' motion to dismiss, and (3) continuing the temporary restraining order in effect until 12:30 P.M., September 12, 1963.

On September 12, 1963, petitioner filed a motion in the United States District Court for a stay to permit him to file an application for permission to appeal in the United

States Court of Appeals for the District of Columbia. On that date, Judge Walsh issued an order (Appendix C, pp. 6a-7a), continuing the temporary restraining order until September 19, 1963, and stating therein that it was the finding of the United States District Court that the order appealed from (Appendix B, pp. 2a-5a) involved a controlling question of law as to which there is a substantial ground for difference of opinion "to wit: That there is not a substantial question of constitutional validity arising from the language of the statute itself (10 U.S.C. 3791, et seq.)"; and that an immediate appeal from the said order may materially advance the ultimate termination of this litigation.

On September 16, 1963, under the provisions of Section 1292(b) of Title 28 U.S.C. and Rule 9(b) of the Rules of the Court of Appeals for the District of Columbia, petitioner filed his motion for permission to take an appeal of the said interlocutory order and for a stay in the United States Court of Appeals for the District of Columbia Circuit.

On September 20, 1963, the United States Court of Appeals for the District of Columbia Circuit denied the said application in a per curiam opinion, (Appendix A, p. 1a), in which Judge Wright dissented as follows:

> "I would grant the motion for interlocutory appeal and extend the stay. The attack on the constitutionality of the statute is not plainly frivolous.[1] Consequently a three-judge district court is required. 28 U.S.C. §2282. Compare *Bailey* v. *Patterson*, 369 U.S. 31 (1962). See *Idlewild Liquor Corp.* v. *Epstein*, 370 U.S. 713 (1962), for authority of this court to entertain the appeal under the circumstances of this case.

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[1] See *Beard* v. *Stahr*, 370 U.S. 41 (1962), in which the Court avoided ruling on the constitutionality of the statute in suit on the grounds urged here. See also in that case the dissenting opinion of Mr. Justice Douglas, concurred in by Mr. Justice Black, with respect to the *constitutionality* of this statute."

The temporary restraining order issued by the District Court expired on September 19, 1963. On September 24, 1963, the Department of the Army issued a further order involuntarily retiring the petitioner from the active list of the Regular Army on September 30, 1963, and placing him on the retired list as of October 1, 1963. This order was stayed by the order of Chief Justice Warren, dated September 30, 1963.

REASONS FOR GRANTING OF WRIT

The questions presented will be considered *seriatim:*

A. The Court of Appeals Should Have Granted Petitioner's Application for an Interlocutory Appeal

Section 1292(b) of Title 28 United States Code provides:

> "(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

Rule 9½ of the General Rules of the United States Court of Appeals for the District of Columbia provides:

> "Applications for permission to take appeals under Section 1292(b) of Title 28, United States Code, from interlocutory orders of a District Court shall set forth the relevant facts, including the nature and a brief history of the proceedings in the District Court with all important dates; shall include or have annexed a

> copy of the order from which an appeal is sought to be taken, together with any findings of fact, conclusions of law and opinion of the District Court relating thereto; and shall state briefly the controlling question of law which the order is believed to involve, the ground for difference of opinion with respect thereto which is believed to be substantial, and the basis for believing that an immediate appeal may materially advance the ultimate termination of the litigation."

Under the cited provisions of the Statute, the District Court Judge stated in his Order of September 12, 1963, that it was "the opinion of this Court that the said Order appealed from involves a controlling question of law as to which there is a substantial ground for difference of opinion, to wit, 'That there is not a substantial question of constitutional validity arising from the language of the Statute itself (10 U.S.C. 3791, et seq.)' and that an immediate appeal from the said order may materially advance the ultimate termination of this litigation * * * "

While it is in the discretion of the Court of Appeals to permit an appeal of an interlocutory question to be taken from the said Order, the interlocutory appeal should be allowed unless it is plainly frivolous. Certainly the question raised, here on appeal is not insubstantial. (*Schneider* v. *Rusk*, U.S. ; 83 S.Ct. 621). Furthermore, no prior decisions of this Court have rendered the petitioner's position frivolous. (*Bailey* v. *Patterson*, 369 U.S. 31; 82 S.Ct. 549). This Court did not decide the constitutional question in the *Beard* case (370 U.S. 41; 82 S.Ct. 1105), but it can be argued that, in the absence of such a decision, by vacating and remanding the judgment of the three-judge District Court, which held the statute to be constitutional, this Court has in effect held that the question of the constitutional validity of the statute (10 U.S. 3791 et seq.) remained open for later consideration.

Therefore, the Court of Appeals should have granted petitioner's application for an appeal to consider this interlocutory question.

B. A Three Judge Court Is Necessary To Hear Petitioner's Motion for a Preliminary and Permanent Injunction

Section 2282 of Title 28, United States Code, provides:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. (June 25, 1948, ch. 646, Section 1, 62 Stat. 968.)

Section 2284 of Title 28, United States Code, provides:

> In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:
>
> (1) The District judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.
>
> (2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days' notice of the hearing shall be given to the governor and attorney general of the State.
>
> If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.
>
> Such notice shall be given by registered mail by the clerk, and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days' notice served upon the attorney general of the State. (June 25, 1948, ch. 646, Section 1, 62 Stat. 968.)

Let us examine the relevant facts of this case under the rule of this Court (*Idlewild Bon Voyage Liquor Corporation* v. *Epstein*, 370 U.S. 711; 82 S.Ct. 1294) that when an

application for a statutory three-judge court is addressed to a District Court, the Court's inquiry is appropriately limited to determining (1) whether the constitutional question raised is substantial; (2) whether the complaint at least formally alleges a basis for equitable relief and; (3) whether the case presented otherwise comes within the requirements of the three-judge statute.

1. The Constitutional Question Raised Is Substantial:

Paragraph 20 of the complaint alleges that Sections 3791-3797 of Title 10, U.S.C., as amended in 1960, are unconstitutional on their face because they provide for separation of an officer from the Army on the grounds of moral dereliction without making any provision for compulsory process to enable the said officer to confront and to cross-examine his accusers, in violation of the due process clause of the Fifth Amendment.

In paragraph 21 of the complaint, Plaintiff repeats the allegation of unconstitutionality as the statute was construed and applied to him in the circumstances of the present case; because he was, in fact, denied confrontation with his accusers because the tribunal lacked subpoena powers to require said accusers to appear before it and denied Plaintiff's request that the accusers be called as his witnesses.

In paragraph 27(c) of the complaint Plaintiff prays that defendants be enjoined from executing and enforcing Sections 3791-3797, Title 10 U.S.C., on the ground of their repugnance to the Constitution.

In his motion for preliminary injunction, Plaintiff prays for such an injunction in respect of the said prayer in paragraph 27(c) of the complaint.

Thus, the Relief sought in paragraph 27(c) of the complaint would restrain the operation of Title 10 U.S.C. 3791 et seq. in other cases, and, therefore, requires a three-judge

court under the rule set forth in *Fleming* v. *Nestor* (363 U.S. 603, 80 S.Ct. 1367) to the effect that the act does not require a three-judge court where the relief sought would not restrain the operation of the statute in other cases.

The U. S. District Court (Judge Walsh) has in its Order of September 12, 1963, stated that there is not a substantial question of constitutional validity arising from the language of the Statute itself, (10 U.S.C. 3791 et seq.) thereby failing to follow the "rule of the case" in the said court, which rule was established by Judge Holtzoff in the prior case of *Beard* v. *Stahr* (200 F. Supp. 766) and which stated in effect that the constitutional question raised under the said statute was substantial.

Here the basic constitutional question is: Can the Secretary of the Army under the provisions of 10 U.S.C. 3791 et seq. order the involuntary retirement of a Regular Army Officer from the Regular Army by violating the rights of said Regular Army Officer under the Fifth Amendment to the Constitution of the U. S.

The *Beard* case (370 U.S. 41; 82 S.Ct. 1105) came to this Court and was disposed of on other grounds, but the question of the appointment of the three-judge court was neither raised nor discussed by this Court. It must, therefore, be assumed that this Court acquiesced in the granting of the petition for a three-judge court and, therefore, in the grounds therefor, namely, that a substantial constitutional question had been raised.

It is submitted, therefore, that a substantial constitutional question is raised herein.

2. The Complaint Formally Alleges a Basis for Equitable Relief:

Paragraphs 16, 19, 22, 23, 25 and 26 of the Complaint allege as follows:

"16. The hearing before the Board of Inquiry was not 'fair and impartial' as required by said Section 3792 (b) of Title 10, U. S. Code, in the following particulars:

"a. The hearing was unfair because plaintiff was deprived of the right to be confronted by and to cross-examine the witnesses against him.

"b. The hearing was unfair because conducted under regulations that shifted the burden of proof to the respondent officer, the plaintiff here, the said regulations gave probative and well-nigh conclusive effect to the *ex parte* allegations drawn by the selection board from a file of papers.

"c. The hearing violated plaintiff's constitutional right not to be twice placed in jeopardy for the same offense, after he had been acquitted by a court martial of the same offenses considered by the Board of Inquiry.

• • •

"19. Section 3791 to 3797, inclusive, of Title 10, U. S. Code, are unconstitutional on their face, because they deprive plaintiff of his office and of the pay, allowances, and perquisites thereunto appertaining, without due process of law, in violation of the Fifth Amendment, in that they provide for separation from the service for derogatory reasons without any facilities for confrontation by and cross-examination of those making the derogatory accusations.

• • •

"20. As construed and applied to the plaintiff in the circumstances of the present case, said Sections 3791 to 3797, inclusive, of Title 10, U. S. Code, are unconstitutional for the same reasons.

"22. Nevertheless, on the basis of said elimination proceedings, the defendants imminently threaten to,

and unless restrained and enjoined by this Court will, irrevocably separate plaintiff from the active list of the Regular Army on August 31, 1963, to his irreparable injury, branded for life as a person unworthy of trust or confidence and permanently stigmatized with moral dereliction without being confronted by his accusers. Plaintiff has now completed more than 24 years of active duty and, if once removed from the active list of the Regular Army, cannot be restored thereto under existing law, nor by executive action, but could only be restored thereto by the enactment of a special Act of Congress authorizing his reappointment and by executive reappointment pursuant to such special legislation. The stigma about to be attached to him by the action of the five defendants will follow him, whatever employment he seeks. The requirements of due process provided by the Fifth Amendment should protect him against this harsh result by giving him the same right to confront his accusers as he would have in a criminal trial, and as he did have before the court martial which acquitted him.

"23. Plaintiff could not be made even monetarily whole except by bringing a succession of suits in the Court of Claims, and therefore does not have a speedy, prompt, or adequate remedy at law. Furthermore, plaintiff is an engineer by profession. Prior to the court martial at which he was acquitted, he served for 1½ years as the Commanding Officer, Ordnance Test Activity, Yuma Test Station, Yuma, Arizona, and as the Commanding Officer, Iowa Ordnance Plant, for 2½ years, both of these assignments requiring Top Secret Restricted Data security clearance. Before the said clearance could be restored to plaintiff after his acquittal by the court martial, the board proceedings were begun, and his security clearance has not yet been restored. In the type of work which he would be qualified to perform after separation from service, he would require a high security clearance which the action of the Under Secretary would permanently deny to him.

* * *

"25. Plaintiff has exhausted all of his administrative remedies. Any appeal to the Secretary of the

Army or his delegate from this order would be only a matter of grace and therefore not an administrative remedy. Any appeal to the Secretary of the Army or his delegate would moreover be fruitless since the Statute (Title 10, U. S. Code, Sec. 3794) provides that action by the Secretary is final and conclusive.'

"26. Plaintiff accordingly has no adequate relief save through this action, and the balance of convenience requires that the *status quo* be maintained during its pendency."

If declaratory relief can be accorded, as it certainly could be (*Bland* v. *Connally*, 110 U. S. App. D.C. 375, 293, F. 2d 852), this action for an injunction is timely to prevent an injustice. It must be conceded that any retirement for moral dereliction is characterized as less than honorable and will result in serious injury. As recently stated: "It not only means the loss of numerous benefits in both the federal and state systems, but it also results in an unmistakable social stigma which greatly limits the opportunities for both public and private civilian employment." (*Bland* v. *Connally*, *ibid*)

It is apparent, therefore, that the complaint thus formally alleges a basis for equitable relief.

3. The Case Presented Otherwise Comes Within the Requirements of the Three Judge Statute:

Subparagraph (1) of 28 U.S.C. 2284 is not applicable to the facts herein since the motion for a three-judge court has been denied.

Under subparagraph (2) of 28 USC 2284, the United States Attorney had more than five days notice of the hearing on the motion for a three judge court. The complaint and motion for a three judge court were filed on August 29, 1963, and the argument on the motion for a three judge court was heard on September 6, 1963.

Under the provisions of subparagraph (3) of 28 USC 2284, Judge Walsh, the district judge to whom application

was made, on August 30, 1963, granted a temporary restraining order (Appendix D, pp. 8a-10a) to prevent irreparable damage to the petitioner, and this order was continued in effect until September 19, 1963, the date of the hearing before the U.S. Court of Appeals. The said order of Judge Walsh contained a specific finding that specified irreparable damage, i.e. loss of his permanent and temporary commissions, and his pay and allowances pertaining thereto, would result if the said temporary restraining order was not granted.

The provisions of subparagraphs (4) and (5) do not apply since the motion for a three judge court was denied.

It is thus apparent that this case otherwise comes within the pertinent requirements of the three judge statute.

Plainly, therefore, Plaintiff in seeking a preliminary injunction to restrain the enforcement and operation of an Act of Congress on the ground of repugnance to the Constitution must proceed under the provisions of the cited statute which require a three judge court. The rule of *Fleming* v. *Nestor* (363 US 603; 80 S.Ct. 1367) concerning the applicability of 28 USC 2282 which states that Section 2282 "does not provide for a case where the validity of an act of Congress is merely drawn in question" is not applicable under the facts of this case where there is an application for an interlocutory or permanent injunction to restrain the enforcement of an Act of Congress.

In conclusion, therefore, a three judge court is necessary to hear petitioner's motion for a preliminary and permanent injunction.

C. Substantial Questions of Constitutional Validity Arises from the Language of 10 U.S.C. 3791 et seq.

Article V of the Amendments to the Constitution provides in pertinent part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in

the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Chapter 360 of Title 10, U.S.C. entitled, "Separation from Regular Army for Moral or Profession Dereliction or in Interests of National Security", provides in pertinent sections as follows:

Section 3791 authorizes the Secretary of the Army to convene Selection Boards "to review the record of any commissioned officer on the active list of the regular army to determine whether he shall be required, *because of moral dereliction*, * * * to show cause for his retention on the active list."

On its face this section violates the above section of the Constitution as follows:

1. The words "*moral dereliction*" are left undefined. If given their ordinary connotation they mean a neglect or failure in duty (Webster's New World Dictionary p. 395) of making the distinction between right and wrong in conduct (Ibid p. 956); we have been unable to discover any meaning in common law for these words. However, if given their military connotation, as stated in paragraph 4 of AR 635-105 they apparently mean conduct within the control of the individual concerned which tends to bring the individual or the army into disrepute. Specifically they mean the following acts:

"(1) Discreditable intentional failure to meet personal financial obligations.

(2) Mismanagement of personal affairs detrimentally affecting the performance of duty of the officer concerned.

(3) Mismanagement of personal affairs to the discredit of the service.

(4) Intentional omission or misstatement of fact in official statements or records, for the purpose of misrepresentation.

(5) Acts of intemperance and/or personal misconduct.

(6) Commission or attempted commission of a homosexual act or existence of homosexual tendencies. See AR 635-89.

(7) Intentional neglect of or failure to perform duties.

(8) Conduct unbecoming an officer.

(9) Acts or behavior not clearly consistent with the interests of national security (see AR 604-10 and par. 2b, app. I).

Thus the Army, because the words have not been defined in the Statute and because their meaning is uncertain in law, has given its own definition of what is "moral dereliction", which is certainly not the commonly accepted sense of the words.

It would, therefore, appear that this section of the statute is void for uncertainty.

2. The requirement "to show cause" compels the officer to be a witness against himself, a violation of the above section of the Constitution "not to be compelled to be a witness against himself". As the Supreme Court said in *Counselman* v. *Hitchcock* (142 U.S. 547):

> "It is an ancient principle of the law of evidence that a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to criminate him or subject him to fines, penalties or forfeitures. *It is impossible that the meaning of the constitutional provision can only be that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. The object was to assure that a person should not be compelled, when acting as a witness in any investigation, to give*

testimony which would tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard. (Counselman v. Hitchcock 142 U.S. 547.)" (Italics added)

Thus, in compelling an officer to be a witness against himself the statute violates the above section of the Constitution.

Section 3792 provides as follows:

"Boards of Inquiry — Composition — Duties — (a) Boards of inquiry, each composed of three or more general officers, shall be convened at such places as the Secretary of the Army may prescribe, to receive evidence and make findings and recommendations whether an officer, required to show cause under Section 3791 of this title, shall be retained on the active list of the Regular Army.

"(b) A fair and impartial hearing before a board of injuiry shall be given to each officer so required to show cause for retention.

"(c) If a board of inquiry determines that the officer has failed to establish that he should be retained on the active list, it shall send the record of its proceedings to a board of review. * * *"

This section is unconstitutional on its face in that it prescribes "a fair and impartial hearing" without defining what is a "fair and impartial hearing", or without prescribing any standard by which a "fair and impartial hearing" may be judged. The question immediately arises: Is this a fair and impartial hearing as established by the Congress under the Administrative Procedures Act which provides in Section 7(c) 5 U.S. 1006 (c) as follows:

"(c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or un-

duly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form."

or is it a fair and impartial hearing under the provisions of AR 635-105, as changed, which provides in pertinent part in paragraph 10, Appendix I, as follows:

"* * * The instructions will include, * * *:

a. *Informing the board members that selection of an officer to show cause for retention is a "prima facie" case for elimination in the absence of convincing evidence advanced by the respondent for further service;* and, that the adverse findings of the selection board, standing alone, is sufficient to support elimination. (Italics added)

b. *Emphasizing that the burden of proof rests with the respondent to show why he should retain his present status."* (Italics added)

It will thus appear that the failure of the Congress to define the words "fair and impartial hearing" make this section void for uncertainty.

This Section is also unconstitutional on its face because it contains the words "*the officer has failed to establish that he should be retained on the active list*", which words shift the burden of proof to the officer concerned in violation of due process of law. Due process requires that the burden of proof be upon the proponent of the order. This means that the party initiating the proceeding has the

general burden of coming forward with a prima facie case, but here the Army by its own *fiat* says that its "*in camera*" findings of the Selection Board constitute a prima facie case, and unless rebutted, are sufficient to support elimination. Thus the Army violates the due process clause and by its violation attempts to pass the burden of proof to the respondent.

The Chapter is unconstitutional on its face because it does not grant subpoena powers to call witnesses, but it does give the Secretary the power to dismiss an officer of the Regular Army for moral dereliction without giving him the right of confrontation.

In the dissenting opinion in the *Beard* case (370 U.S. 41; 82 S.Ct. 1105), Mr. Justice Douglas, with whom Mr. Justice Black concurred, stated in pertinent part:

> "Dismissal is one thing; dismissal with stigma, as here, is quite another. Dismissal with stigma is a severe penalty. In comparable situations, the Government has been required to carry the burden of proof. Kwong Hai Chew v. Rogers, 103 U.S. App. D.C. 228, 257 F. 2d 606; Wood v. Hoy, 9 Cir., 266 F. 2d 825, 830. Unless this burden is meticulously maintained, discharge for race, for religion, for political opinion, or for beliefs may masquerade under unproved charges. This right, like the right to be heard, is basic to our society. Cf. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L. Ed. 817 (concurring opinion); Beilan v. Board of Public Education, 357 U.S. 399, 421-423, 78 S.Ct. 1317, 1330-1331, 2 L. Ed. 2d 1414 (dissenting opinion); Wieman v. Updegraff, 344 U.S. 183, 191, 73 S.Ct. 215, 218, 97 L. Ed. 216."
>
> "* * * Confrontation and cross-examination are, as I understand the law, vital when one's employment rights are involved (see Greene v. McElroy, 360 U.S. 474, 496, 79 S.Ct. 1400, 1413, 3 L. Ed. 2d 1377). * * * Faceless informers are often effective if they need not take the stand. A fair hearing requires the production of the accuser so that cross-examination can test his character and reliability."

Here the petitioner will be retired with the stigma of moral dereliction, a severe penalty. Before the Board the Government was not required to carry the burden of proof and, therefore, the Board found for elimination. However, before the Court Martial the Government was required to carry the burden of proof and the petitioner was acquitted (See Appendix E, pp. 11a-18a). Before the Board the petitioner was denied confrontation and cross-examination of the "faceless informers" who were his accusers. But in the Court Martial the right of cross-examination and confrontation was not denied him, and petitioner was acquitted.

Before the Board petitioner was denied a "fair hearing" which requires the production of the informers and which requires the party initiating the proceeding to come forward with a *prima facie* case. At the Court Martial, the Government through its witnesses presented its *prima facie* case and the petitioner was acquitted.

The action of the Board, in violation of the constitutional rights of the petitioner, should not be permitted to render his acquittal by a general court martial a nullity.

The present case is ripe for review. As soon as the Secretary of the Army again orders the involuntary retirement of the petitioner, he will be severed from the Regular Army with less than an honorable retirement. At stake is a man's professional standing, his character, and his claim to an honorable retirement. "Where the Army departs from the statutory standard which prescribes the basis on which discharges will be issued, the federal courts can intervene." (See *Harmon* v. *Brucker*, 355 U.S. 579, 78 S. Ct. 433, 2 L. Ed. 503.)

From the above it can readily be seen that substantial questions of constitutional validity arise from the language of the Statute itself.

CONCLUSION

It is respectfully submitted that a writ of certiorari should issue to review the decision of the Court of Appeals for the District of Columbia, or, in the alternative, to rule upon the interlocutory order issued by the United States District Court for the District of Columbia, and if said ruling finds that a substantial question of constitutional validity arises from the language of the statute, (10 U.S.C. 3791 et seq.) itself, to rule upon the constitutionality of the said statute.

WILLIAM G. DOWNEY, JR.
Northern Virginia Bank Building
Springfield, Virginia

CHARLES D. T. LENNHOFF
Northern Virginia Bank Building
Springfield, Virginia

Attorneys for Petitioner

October, 1963.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1963

No. 18,123

JEWEL RICHARD BROWDER, *Applicant*,

v.

CYRUS R. VANCE, et al., *Respondent*.

Before: Wilbur K. Miller, Fahy and Wright, Circuit Judges, in chambers.

Order

This cause came on for hearing on applicant's application for permission to take an appeal from an interlocutory order of the District Court and for stay, and said application was argued by counsel. On consideration whereof, it is

ORDERED by the court that the application is hereby denied.

Per Curiam.

Dated: Sept. 20, 1963

WRIGHT, *Circuit Judge, dissenting:* I would grant the motion for interlocutory appeal and extend the stay. The attack on the constitutionality of the statute is not plainly frivolous.[1] Consequently, a three-judge district court is required. 28 U.S.C. § 2282. Compare *Bailey* v. *Patterson*, 369 U.S. 31 (1962). See *Idlewild Liquor Corp.* v. *Epstein*, 370 U.S. 713 (1962), for authority of this court to entertain the appeal under the circumstances of this case.

[1] See *Beard* v. *Stahr*, 370 U.S. 41 (1962), in which the Court avoided ruling on the constitutionality of the statute in suit on the grounds urged here. See also in that case the dissenting opinion of Mr. Justice Douglas, concurred in by Mr. Justice Black, with respect to the constitutionality of this statute.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA CIRCUIT

C. A. 2182-63

JEWEL RICHARD BROWDER, *Plaintiff*

v.

CYRUS R. VANCE, SECRETARY OF THE ARMY, et al., Defendants

Memorandum and Order

This matter comes before the court on a motion by plaintiff to convene a three-judge court pursuant to Sections 2282 and 2284 of Title 28, United States Code. The motion was argued and submitted on September 6, 1963.

The plaintiff, a Lt. Colonel in the U.S. Army, was ordered removed from the active list of regular officers by the defendant Secretary of the Army in accordance with Section 3791, et. seq. of Title 10, U.S. Code. Plaintiff's removal was directed to take place on August 31, 1963.

On August 30, 1963, this court entered a Temporary Restraining Order which stayed the removal in order to prevent irreparable injury pending determination of the constitutional questions raised; and, in order to grant plaintiff a hearing on the motion to convene a three-judge court when his counsel, who was then on temporary active duty with the U.S. Army, would be present.

The facts before this court indicate that the plaintiff was acquitted of certain charges and specifications before a General Court Martial on January 26, 1962. Subsequently, on February 1, 1962, plaintiff was advised that he would be required to show cause before a board of general officers, convened pursuant to 10 U.S. Code 3791, et. seq., why he should not be removed from the active list of the regular Army for: (1) acts of personal misconduct; (2)

intentional omission or misstatements of facts in official documents; and, (3) conduct unbecoming an officer.

Plaintiff alleges that these charges arose from the same reports and information comprising the charges and specifications on which he was acquitted by a General Court Martial.

The Board of Inquiry held a hearing on December 10 and 11, 1962 at which time plaintiff was represented by counsel. Plaintiff had requested that thirty witnesses be called, but was advised that twenty-two were not available. Plaintiff waived his request as to the remaining eight.

The Board found that cause had not been shown for retention of the plaintiff and recommended that he be removed from the active list of regular officers. These findings were reviewed and sustained by the Army Board of Review for Eliminations and subsequently approved by the Secretary of the Army.

The plaintiff now prays for a three-judge court to determine the constitutional validity of the statute (10 U.S.C. 3791 et. seq.) upon which his removal is predicated. Specifically, plaintiff alleges that his hearing was not "fair and impartial" as required by Section 3792 (b) of Title 10 in that plaintiff was deprived of the right to confront and cross examine witnesses against him; the burden of proof was on the respondent before the Board; and that the proceedings subsequent to the court martial twice placed him in jeopardy for the same offense.

The sole question before this court is whether plaintiff has established that the statute raises a substantial constitutional question which should be determined by a three-judge court. It is the opinion of this court that the plaintiff has not shown that a substantial constitutional question exists and the motion to convene a three-judge court is denied.

In denying the motion for a three-judge court we do not rule on the issues raised by the complaint; and, further, the motion to dismiss by the Government is denied. We hold only that the plaintiff has not established that there is a substantial question of constitutional law arising from the language of the statute itself.

As the Court of Appeals for the District of Columbia circuit has stated:

> We do not agree with the suggestion, made during oral argument before us, that Title 28, U.S.C.A 2282, required the case to be heard and determined by a district court of three judges . . . We have already noted that the complaint did not challenge the constitutionality of the statute but alleged merely that the act of the Board amounted to deprivation of property without due process. That being true, a three-judge court was not necessary. (citations omitted) *Keyes* v. *Madsen*, 1949, 86 U.S. App. D.C. 24, 179 F. 2d 40, 43. Cert. denied, 339 U.S. 928.

This is the situation here. The Plaintiff is attacking the procedures utilized by the Army pursuant to 10 U.S.C. 3791 et. seq. and not the statute itself. The procedures may be violative of the constitutional rights of the plaintiff, but it does not necessarily follow that the Act of Congress is repugnant to the Constitution.

> The Supreme Court has also ruled that the Act of Congress providing for a court of three judges and a direct appeal to this Court, is not applicable unless the questions raised as to the constitutional validity of an Act of Congress are substantial. *Jameson and Co.* v. *Morgenthau*, 1939, 307 U.S. 171, 172, citing *California Water Service Co.* v. *Redding*, 304 U.S. 252, 254, 255.

And further, in *Jamieson*, supra at 173 the court stated:

"It does not appear to have been the intention of Congress that direct appeal should lie to this Court when administrative action and not the Act of Congress is assailed."

Therefore, in accordance with the foregoing, it is this 10th day of September 1963,

ORDERED: that plantiff's motion to convene a three-judge court pursuant to 28 U.S.C. 2282 and 2284 be, and the same hereby is, denied; and, it is further,

ORDERED: that defendants' motion to dismiss be, and the same hereby is, denied; and it is further,

ORDERED: that the defendants be, and hereby are, restrained from taking any steps for the removal of the plaintiff, Jewel Richard Browder, from the active list of the Army for a period of 48 hours from the entry of this order.

/s/ LEONARD P. WALSH
Judge

Issued at 12:30 p.m. Sept. 10, 1963

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA CIRCUIT

C. A. 2182-63

JEWEL RICHARD BROWDER, *Plaintiff*

v.

CYRUS R. VANCE, et al., *Defendants*

Order

Having heard and denied Plaintiff's motion for a three-judge court, and having heard and denied Defendants' motion to dismiss Plaintiff's complaint, and Plaintiff having requested a stay in order to give him an opportunity to appeal the interlocutory ruling of this Court, dated September 10, 1963, at 12:30 P.M., to the United States Court of Appeals for the District of Columbia, and to apply to said Court for a stay pending appeal; and it being the opinion of this Court that the said order appealed from involves a controlling question of law as to whic. there is substantial ground for difference of opinion, to wit, "that there is not a substantial question of constitutional validity arising from the language of the statute itself (10 U.S.C. 3791, et seq.);" and that an immediate appeal from the said order may materially advance the ultimate termination of this litigation, it is hereby, this 12th day of September, 1963;

ORDERED, that the Defendants, and each of them, be, and they are hereby, restrained from taking any steps for the removal of the Plaintiff, Jewel Richard Browder, from the active list of the Regular Army until September 19, 1963, at 12 o'clock Noon, and

FURTHER ORDERED that this stay is conditioned on Plaintiff's filing an application for permission to take an appeal to the United States Court of Appeals for the District of Columbia under Rule 9½ of the said Court of Appeals.

/s/ LEONARD P. WALSH
Leonard P. Walsh, *Judge*

WILLIAM G. DOWNEY, JR., Esq.
P. O. Box 6
Springfield, Virginia

SYLVIA A. BACON, Esq.
Assistant United States Attorney

A TRUE COPY TEST:
HARRY M. HULL, *Clerk*,
By FRANCES H. VANN
Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA CIRCUIT

C. A. 2182-63

JEWEL RICHARD BROWDER, *Plaintiff*

v.

CYRUS R. VANCE, et al., *Defendent*

Temporary Restraining Order

This cause came to be heard on plaintiff's motion for a temporary restraining order, and it appearing to the court that:

1. Plaintiff is an officer in the Regular Army of the United States;

2. He is about to be removed from the active list of the Regular Army as a result of administrative elimination proceedings undertaken pursuant to Sections 3791 to 3797, inclusive, of Title 10, U. S. Code, as added by Section 3(a) of the Act of July 12, 1960, Public Law 86-616;

3. In those proceedings he was denied the right to be confronted by and to cross-examine his accuser, and the statute makes no provision for compulsory process although it authorizes administrative elimination for moral and professional dereliction;

4. Those proceedings were conducted under regulations which required the allegations that were made against the plaintiff in the *ex parte* order to show cause to be disproved by him, and which expressly shifted to the plaintiff the burden of showing his innocence;

5. Plaintiff's removal from the active list of the Army would cost him both his permanent and temporary com-

missions, and his pay, allowances, and perquisites thereunto appertaining;

6. Once plaintiff is removed from the active list of the Army he cannot be restored thereto by any means short of a special Act of Congress;

7. The defendants, unless, restrained, plan to remove plaintiff from the active list of the Army, and such removal is imminently and immediately threatened to take place on August 31, 1963; and

8. The plaintiff has exhausted all of his administrative remedies, and has no adequate remedy except equitable relief from this Court.

Therefore, it appearing to the Court that defendant is about to commit the acts hereinafter referred to and that he will do so unless restrained by order of this court, and that immediate and irreparable injury, loss and damage will result to plaintiff before notice can be served and a hearing had on plaintiff's motion for a preliminary injunction, in that plaintiff's removal from the active list of the Army would cost him both his permanent and temporary commissions, his pay and allowances, pertaining thereto; and since said removal will take place on August 31, 1963, unless defendant be restrained by this Court, it is this 30th day of August, 1963,

ORDERED, that defendant Cyrus R. Vance, Secretary of the Army, his agents, servants, employees, and all persons in active concert and participation with him be, and they hereby are, restrained from taking any steps for the removal of the plaintiff, Jewel Richard Browder, from the active list of the Army; *provided*, that the plaintiff first give security in the sum of ONE HUNDRED DOLLARS ($100.00) for the payment of such costs and damages as may be incurred or suffered by any part who is found to have been wrongfully enjoined or restrained, such bond to be approved by the Court; and

IT IS FURTHER ORDERED that this order shall expire on the 19th day of September, 1963, unless prior to such time the order for good cause shown is extended for a like period, or unless the defendant consents that it may be extended for a longer period; and

IT IS FURTHER ORDERED, that plaintiff's motion for a preliminary injunction, and plaintiff's motion for a three-judge court be set down for hearing on September 10, 1963, at 10 o'clock A.M., in the United States District Court for the District of Columbia.

Issued at 12:30 P.M.
August 30, 1963

(Signed) LEONARD P. WALSH
Leonard P. Walsh, *Judge*

A TRUE COPY TEST:
HARRY M. HULL, *Clerk*.

By FRANCES H. VANN
Deputy Clerk

APPENDIX E

HEADQUARTERS
SECOND UNITED STATES ARMY
Fort George G. Meade, Maryland

20 April 1962

General Court-Martial Order
Number 5

Before a general court-martial which convened at Fort George G. Meade, Maryland, pursuant to Court-Martial Appointing Order Number 3, Headquarters Second United States Army, Fort George G. Meade, Maryland, dated 12 January 1962, was arraigned and tried:

Lieutenant Colonel Jewel R. Browder, 045583, U. S. Army, Headquarters, United States Army Ordnance Aberdeen Proving Ground (4560), Aberdeen Proving Ground, Maryland.

CHARGE I: Violation of the Uniform Code of Military Justice, Article 121

Specification 1: In that Lieutenant Colonel Jewel R. Browder, United States Army, Headquarters, United States Army Ordnance Aberdeen Proving Ground (4560), Aberdeen Proving Ground, Maryland, then of Iowa Ordnance Plant, Burlington, Iowa, did, at Iowa Ordnance Plant, Burlington, Iowa, on or about 30 September 1958, steal United States currency, of a value of about $136.80, the property of the United States.

Specification 2: In that Lieutenant Colonel Jewel R. Browder, United States Army, Headquarters, United States Army Ordnance Aberdeen Proving Ground (4560), Aberdeen Proving Ground, Maryland, then of Iowa Ordnance Plant, Burlington, Iowa, did, at Iowa Ordnance Plant, Burlington, Iowa, on or about 31 October 1958, steal

United States currency, of a value of about $136.80, the property of the United States.

Specification 3: In that Lieutenant Colonel Jewel R. Browder, United States Army, Headquarters, United States Army Ordnance Aberdeen Proving Ground (4560), Aberdeen Proving Ground, Maryland, then of Iowa Ordnance Plant, Burlington, Iowa, did, at Iowa Ordnance Plant, Burlington, Iowa, on or about 30 November 1958, steal United States currency, of a value of about $136.80, the property of the United States.

Specification 4: In that Lieutenant Colonel Jewel R. Browder, United States Army, Headquarters, United States Army Ordnance Aberdeen Proving Ground (4560), Aberdeen Proving Ground, Maryland, then of Iowa Ordnance Plant, Burlington, Iowa, did, at Iowa Ordnance Plant, Burlington, Iowa, on or about 31 December 1958, steal United States currency, of a value of about $136.80, the property of the United States.

Specification 5: In that Lieutenant Colonel Jewel R. Browder, United States Army, Headquarters, United States Army Ordnance Aberdeen Proving Ground (4560), Aberdeen Proving Ground, Maryland, then of Iowa Ordnance Plant, Burlington, Iowa, did, at Iowa Ordnance Plant, Burlington, Iowa, on or about 31 January 1959, steal United States currency, of a value of about $136.80, the property of the United States.

Specification 6: In that Lieutenant Colonel Jewel R. Browder, United States Army, Headquarters, United States Army Ordnance Aberdeen Proving Ground (4560), Aberdeen Proving Ground Maryland, then of Iowa Ordnance Plant, Burlington, Iowa, did, at Iowa Ordnance Plant, Burlington, Iowa, on or about 28 February 1959, steal United States currency, of a value of about $136.80, the property of the United States.

Specification 7: In that Lieutenant Colonel Jewel R. Browder, United States Army, Headquarters, United States Army Ordnance Aberdeen Proving Ground (4560), Aberdeen Proving Ground Maryland, then of Iowa Ordnance Plant, Burlington, Iowa, did, at Iowa Ordnance Plant, Burlington, Iowa, on or about 31 March 1959, steal United States currency, of a value of about $136.80, the property of the United States.

Specification 8: In that Lieutenant Colonel Jewel R. Browder, United States Army, Headquarters, United States Army Ordnance Aberdeen Proving Ground (4560), Aberdeen Proving Ground Maryland, then of Iowa Ordnance Plant, Burlington, Iowa, did, at Iowa Ordnance Plant, Burlington, Iowa, on or about 30 April 1959, steal United States currency, of a value of about $136.80, the property of the United States.

Specification 9: In that Lieutenant Colonel Jewel R. Browder, United States Army, Headquarters, United States Army Ordnance Aberdeen Proving Ground (4560), Aberdeen Proving Ground Maryland, then of Iowa Ordnance Plant, Burlington, Iowa, did, at Iowa Ordnance Plant, Burlington, Iowa, on or about 31 May 1959, steal United States currency, of a value of about $136.80, the property of the United States.

Specification 10: In that Lieutenant Colonel Jewel R. Browder, United States Army, Headquarters, United States Army Ordnance Aberdeen Proving Ground (4560), Aberdeen Proving Ground Maryland, then of Iowa Ordnance Plant, Burlington, Iowa, did, at Iowa Ordnance Plant, Burlington, Iowa, on or about 30 June 1959, steal United States currency, of a value of about $136.80, the property of the United States.

Specification 11: In that Lieutenant Colonel Jewel R. Browder, United States Army, Headquarters, United States Army Ordnance Aberdeen Proving Ground (4560), Aber-

deen Proving Ground Maryland, then of Iowa Ordnance Plant, Burlington, Iowa, did, at Iowa Ordnance Plant, Burlington, Iowa, on or about 31 July 1959, steal United States currency, of a value of about $136.80, the property of the United States.

Specification 12: In that Lieutenant Colonel Jewel R. Browder, United States Army, Headquarters, United States Army Ordnance Aberdeen Proving Ground (4560), Aberdeen Proving Ground Maryland, then of Iowa Ordnance Plant, Burlington, Iowa, did, at Iowa Ordnance Plant, Burlington, Iowa, on or about 31 August 1959, steal United States currency, of a value of about $136.80, the property of the United States.

Specification 13: In that Lieutenant Colonel Jewel R. Browder, United States Army, Headquarters, United States Army Ordnance Aberdeen Proving Ground (4560), Aberdeen Proving Ground Maryland, then of Iowa Ordnance Plant, Burlington, Iowa, did, at Iowa Ordnance Plant, Burlington, Iowa, on or about 30 September 1959, steal United States currency, of a value of about $136.80, the property of the United States.

Specification 14: In that Lieutenant Colonel Jewel R. Browder, United States Army, Headquarters, United States Army Ordnance Aberdeen Proving Ground (4560), Aberdeen Proving Ground Maryland, then of Iowa Ordnance Plant, Burlington, Iowa, did, at Iowa Ordnance Plant, Burlington, Iowa, on or about 31 October 1959 steal United States currency, of a value of about $136.80, the property of the United States.

Specification 15: In that Lieutenant Colonel Jewel R. Browder, United States Army, Headquarters, United States Army Ordnance Aberdeen Proving Ground (4560), Aberdeen Proving Ground Maryland, then of Iowa Ordnance Plant, Burlington, Iowa, did, at Iowa Ordnance Plant, Burlington, Iowa, on or about 30 November 1959, steal

United States currency, of a value of about $136.80, the property of the United States.

Specification 16: In that Lieutenant Colonel Jewel R. Browder, United States Army, Headquarters, United States Army Ordnance Aberdeen Proving Ground (4560), Aberdeen Proving Ground Maryland, then of Iowa Ordnance Plant, Burlington, Iowa, did, at Iowa Ordnance Plant, Burlington, Iowa, on or about 31 December 1959, steal United States currency, of a value of about $136.80, the property of the United States.

Specification 17: In that Lieutenant Colonel Jewel R. Browder, United States Army, Headquarters, United States Army Ordnance Aberdeen Proving Ground (4560), Aberdeen Proving Ground Maryland, then of Iowa Ordnance Plant, Burlington, Iowa, did, at Iowa Ordnance Plant, Burlington, Iowa, on or about 31 January 1960, steal United States currency, of a value of about $136.80, the property of the United States.

Specification 18: In that Lieutenant Colonel Jewel R. Browder, United States Army, Headquarters, United States Army Ordnance Aberdeen Proving Ground (4560), Aberdeen Proving Ground Maryland, then of Iowa Ordnance Plant, Burlington, Iowa, did, at Iowa Ordnance Plant, Burlington, Iowa, on or about 29 February 1960, steal United States currency, of a value of about $136.80, the property of the United States.

Specification 19: In that Lieutenant Colonel Jewel R. Browder, United States Army, Headquarters, United States Army Ordnance Aberdeen Proving Ground (4560), Aberdeen Proving Ground Maryland, then of Iowa Ordnance Plant, Burlington, Iowa, did, at Iowa Ordnance Plant, Burlington, Iowa, on or about 31 March 1960, steal United States currency, of a value of about $136.80, the property of the United States.

CHARGE II: Violation of the Uniform Code of Military Justice, Article 132

Specification 1: In that Lieutenant Colonel Jewel R. Browder, United States Army, Headquarters, United States Army Ordnance Aberdeen Proving Ground (4560), Aberdeen Proving Ground, Maryland, then of Iowa Ordnance Plant, Burlington, Iowa, did, at Ordance Ammunition Command, Joliet, Illinois, on or about 31 March 1960, by presenting a voucher to Lieutenant Colonel Ross E. Leach, an officer of the United States duly authorized to approve and pay such claim, present for approval and payment a claim against the United States in the amount of $32.22 for reimbursement for travel (dependents of military personnel), which claim was false in the amount of $32.22 in that the claimed dependent, Mrs. Dana Lee Browder, was not a legal dependent of the said Lieutenant Colonel Jewel R. Browder at the time travel was performed, and was then known by the said Lieutenant Colonel Jewel R. Browder to be false.

Specification 2: In that Lieutenant Colonel Jewel R. Browder, United States Army, Headquarters, United States Army Ordance Aberdeen Proving Ground (4560), Aberdeen Proving Ground, Maryland, then of Iowa Ordnance Plant, Burlington, Iowa, did, at Ordnance Ammunition Command, Joliet, Illinois, on or about 23 October 1959, by presenting OAC Form 448 (Travel Summary) to Lieutenant Colonel Ross E. Leach, an officer of the United States duly authorized to approve and pay such claim, present for approval and payment a claim against the United States in the amount of $66.50 for pay for travel from Iowa Ordnance Plant, Burlington, Iowa, to Utica, New York, which claim was false and fraudulent in the amount of $66.50 in that the said Lieutenant Colonel Jewel R. Browder was not authorized pay for travel from Iowa Ordnance Plant, Burlington, Iowa, to Utica, New York, and was then known by the said Lieutenant Colonel Jewel R. Browder to be false and fraudulent.

CHARGE III: Violation of the Uniform Code of Military Justice, Article 133

Specification 1: In that Lieutenant Colonel Jewel R. Browder, United States Army, Headquarters, United States Army Ordnance Aberdeen Proving Ground (4560), Aberdeen Proving Ground, Maryland, then of Iowa Ordnance Plant, Burlington, Iowa, did, at Iowa Ordnance Plant, Burlington, Iowa, from on or about 31 October 1959 to on or about 31 March 1960, steal United States currency, of a value of about $820.80, the property of the United States.

Specification 2: In that Lieutenant Colonel Jewel R. Browder, United States Army, Headquarters, United States Army Ordnance Aberdeen Proving Ground (4560), Aberdeen Proving Ground, Maryland, then of Iowa Ordnance Plant, Burlington, Iowa, did, at Ordnance Ammunition Command, Joliet, Illinois, on or about 31 March 1960, by presenting a voucher to Lieutenant Colonel Ross E. Leach, an officer of the United States duly authorized to approve and pay such claim, present for approval and payment a claim against the United States in the amount of $32.22 for reimbursement for travel (dependants of military personnel), which claim was false in the amount of $32.22 in that the claimed dependent, Mrs. Dana Lee Browder, was not a legal dependent of the said Lieutenant Colonel Jewel R. Browder at the time travel was performed, and was then known by the said Lieutenant Colonel Jewel R. Browder to be false.

Specification 3: In that Lieutenant Colonel Jewel R. Browder, United States Army, Headquarters, United States Army Ordnance Aberdeen Proving Ground (4560), Aberdeen Proving Ground, Maryland, then of Iowa Ordnance Plant, Burlington, Iowa, did, at Ordnance Ammunition Command, Joliet, Illinois, on or about 23 Octboer 1959, by presenting OAC Form 448 (Travel Summary) to Lieutenant Colonel Ross E. Leach, an officer of the United States duly authorized to approve and pay such claim, present for

approval and payment a claim against the United States in the amount of $66.50 for pay for travel from Iowa Ordnance Plant, Burlington, Iowa, to Utica, New York, which claim was false and fraudulent in the amount of $66.50 in that the said Lieutenant Colonel Jewel R. Browder was not authorized pay for travel from Iowa Ordance Plant, Burlington, Iowa, to Utica, New York, and was then known by the said Lieutenant Colonel Jewel R. Browder to be false and fraudulent.

PLEAS

To all *Specifications* and Charges:	Not Guilty.

FINDINDS

Of all *Specifications*, Charge I:	Not Guilty.
Of Charge I:	Not Guilty.
Of *Specification 1*, Charge II:	Not Guilty.
Of *Specification 2*, Charge II:	Motion for finding of not guilty sustained.
Of Charge II:	Not Guilty.
Of *Specification 1*, Charge III:	Not Guilty.
Of *Specification 2*, Charge III:	Not Guilty.
Of *Specification 3*, Charge III:	Motion for finding of not guilty sustained.
Of Charge III:	Not Guilty.

The findings were announced on 26 January 1962.

BY COMMAND OF LIEUTENANT GENERAL GAITHER:

(SEAL)

Official:
M. J. BARTOSIK
Colonel, AGC
Acting Adjutant General

JOHN R. PUGH
Brigadier General, GS
Chief of Staff

APPENDIX F

(SEAL)

RWV/hlm

HEADQUARTERS
DEPARTMENT OF THE ARMY
OFFICE OF THE ADJUTANT GENERAL
WASHINGTON 25, D.C.

Suspense Date
27 July 1962

In Reply Refer To
AGPO-SE 201 Browder, Jewel R.
045583 (27 Jul 62)

SUBJECT: Notification to Show Cause for Retention in the Army

To: Commanding General
Second United States Army

1. A board of officers convened at Headquarters, Department of the Army on 17 July 1962 and determined that Lieutenant Colonel Jewel R. Browder, 045583, Ordnance Corps, United States Army Ordnance, Aberdeen Proving Ground, Maryland, be required to show cause for retention on the active list of the Regular Army because of moral or professional dereliction as evidenced by:

a. Acts of personal misconduct.

b. Intentional omission or misstatement of facts in official statements and records, for the purpose of misrepresentation.

c. Conduct unbecoming an officer.

2. You will notify this officer of this action and furnish him copies of the inclosed papers which include the selection board's determination and documentary evidence

pertinent to his case. You will further advise officer of specific elections to which he is entitled under the provisions of paragraph 16, AR 635-105. In the event officer:

a. Tenders his resignation—officer's request will be prepared in accordance with format attached as inclosure 4.

b. Requests discharge (for Regular Army officers only)—officer's request will be prepared in accordance with format attached as inclosure 5.

c. Desires to apply for voluntary retirement, if eligible—officer's request will be prepared in accordance with the provisions of AR 635-130. Format for voluntary retirement found in paragraph 23b, AR 635-130, will be amended as required by paragraph 16b(3), AR 635-105, Changes 4 dated 12 January 1962.

d. Elects to appear before board of inquiry—process in accordance with AR 635-105, as changed. It is desired that board of inquiry be instructed that any evidence relating to substandard performance of duty which tends to reflect adversely upon respondent's performance of duty, will not be considered in arriving at the board's findings and recommendations.

3. When officer elects a, b, or c above, one complete set of inclosures 1, 2, and 3, together with officer's election will be returned through channels to this office.

4. If officer is eligible and applies for retirement in lieu of further elimination action under the provisions of paragraph 16c(1), AR 635-105, elimination proceedings will continue until major command is advised that application has been accepted by Headquarters, Department of the Army.

5. This headquarters (Attention: AGPO-SE) will be advised by message immediately the election of officer in accordance with paragraph 16b, AR 635-105.

6. Control of flagging action, under AR 600-31, initiated against this officer, is the responsibility of your command.

By Order of the Secretary of the Army:

ROBERT W. VAUGHN
Adjutant General

5 Inc. (1 thru 3 in quad)

1. Selection Bd Rept.
2. Analysis and Evaluation
3. Docu Evid (1 Docu)
4. Format—Tender of Resignation
5. Format—Request for Discharge

This correspondence is marked "FOR OFFICIAL USE ONLY" solely because of the addition of inclosure(s) (3). When this inclosure(s) is (are) removed protective markings will be cancelled.

APPENDIX G

Statute Involved

The present appeal concerns the following portions of Title 10, U.S. Code, as added by Section 3(a) of the Act of July 12, 1960, Pub. L. 86-616, 74 Stat. 386, 388:

CHAPTER 360.—SEPARATION FROM REGULAR ARMY FOR MORAL OR PROFESSIONAL DERELICTION OR IN INTERESTS OF NATIONAL SECURITY

§ 3791. Selection boards: composition; duties

The Secretary of the Army may at any time convene a board of general officers to review the record of any commissioned officer on the active list of the Regular Army to determine whether he shall be required, because of moral dereliction, professional dereliction, or because his retention is not clearly consistent with the interests of national security, to show cause for his retention on the active list.

§ 3792. Boards of inquiry: composition; duties

(a) Boards of inquiry, each composed of three or more general officers, shall be convened at such places as the Secretary of the Army may prescribe, to receive evidence and make findings and recommendations whether an officer, required to show cause under section 3791 of this title, shall be retained on the active list of the Regular Army.

(b) A fair and impartial hearing before a board of inquiry shall be given to each officer so required to show cause for retention.

(c) If a board of inquiry determines that the officer has failed to establish that he should be retained on the active list, it shall send the record of its proceedings to a board of review.

(d) If a board of inquiry determines that the officer has established that he should be retained on the active list, his case is closed. However, at any future time, he may be again required to show cause for retention under section 3791 of this title.

§ 3793. Boards of review: composition; duties

(a) Boards of review, each composed of three or more general officers, shall be convened by the Secretary of the Army, at such times as he may prescribe, to review the records of cases of officers recommended by boards of inquiry for removal from the active list of the Regular Army under section 3792 of this title.

(b) If, after reviewing the record of the case, a board of review determines that the officer has failed to establish that he should be retained on the active list, it shall send its recommendation to the Secretary for his action.

(c) If, after reviewing the record of the case, a board of review determines that the officer has established that he should be retained on the active list, his case is closed. However, at any future time, he may be again required to show cause for retention under section 3791 of this title.

§ 3794. Removal of officer: action by Secretary of the Army upon recommendation

The Secretary of the Army may remove an officer from the active list of the Regular Army if his removal is recommended by a board of review under this chapter. The Secretary's action in such a case is final and conclusive.

§ 3795. Rights and procedures

Each officer under consideration for removal from the active list of the Regular Army under this chapter shall be—

(1) notified in writing of the charges against him, at least 30 days before the hearing of his case by a

board of inquiry, for which he is being required to show cause for retention on the active list;

(2) allowed reasonable time, as determined by the board of inquiry under regulations of the Secretary of the Army, to prepare his defense;

(3) allowed to appear in person and by counsel at proceedings before a board of inquiry; and

(4) allowed full access to, and furnished copies of, records relevant to his case at all stages of the proceeding, except that a board shall withhold any records that the Secretary determines should be withheld in the interests of national security.

In any case where any records are withheld under clause (4), the officer whose case is under consideration shall, to the extent that the national security permits, be furnished a summary of the records so withheld.

§ 3796. Officers considered for removal: retirement or discharge

(a) At any time during proceedings under this chapter and before the removal of an officer from the active list of the Regular Army, the Secretary of the Army may grant his request—

(1) for voluntary retirement, if he is otherwise qualified therefor; or

(2) for discharge under subsection (b):

(b) Each officer removed from the active list of the Regular Army under this chapter shall—

(1) if on the date of removal he is eligible for voluntary retirement under any law, be retired in the grade and with the pay for which he would be eligible if retired at his request; or

(2) if on that date he is ineligible for voluntary retirement under any law, be discharged in the grade then held with severance pay computed by multiplying his years of active commissioned service, but not more than 12, by one month's basic pay of that grade.

(c) For the purposes of subsection (b)(2), a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded.

§ 3797. Officers eligible to serve on boards

(a) No officer may serve on a board under this chapter unless he is senior in regular grade to, and outranks, any officer considered by that board.

(b) No person may be a member of more than one board convened under this chapter for the same officer.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 594

JEWEL RICHARD BROWDER, PETITIONER

v.

CYRUS R. VANCE, SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The Court of Appeals for the District of Columbia Circuit rendered no opinion in this case, and its order denying permission to take an interlocutory appeal (Pet. App. 1a) is not yet reported. The memorandum and order of the district court (Pet. App. 2a–5a) are not yet reported.

JURISDICTION

The court of appeals has entered no judgment. Its order denying permission to take an interlocutory appeal was entered on September 20, 1963. The petition for a writ of certiorari was filed on October 30,

1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the denial by the court of appeals of petitioner's application for an interlocutory appeal constituted an abuse of its discretion in the circumstances of this case.

STATUTE INVOLVED

Section 1292(b) of Title 28 provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: * * *.

STATEMENT

1. The complaint in this case alleges the following facts, which are undisputed for purposes of consideration of the petition for certiorari.[1]

Petitioner is a commissioned officer in the United States Army, with a permanent rank of Major and a temporary rank of Lieutenant Colonel. He is on active duty in the Ordnance Corps and stationed at

[1] The record before the district court (and court of appeals) consisted only of petitioner's unverified complaint, his motion to convene a three-judge court, which is unsupported by any affidavit, and respondents' motion to dismiss.

Aberdeen Proving Ground, Maryland. In July, 1962, after petitioner had been acquitted by a general court martial of charges of having stolen various sums of money (Pet. App. 11a–15a, 17a), and having knowingly presented false travel claims and vouchers for payment (Pet. App. 16a–18a), petitioner was advised that a selection board of general officers convened at Headquarters, Department of the Army, had determined, pursuant to 10 U.S.C. 3791, that he should be required to show cause for retention on the active list of the Regular Army. The grounds asserted for the order to show cause were acts of personal misconduct, intentional misrepresentation of facts in official statements and records, and conduct unbecoming an officer (Pet. App. 19a–21a). Petitioner was entitled to elect among the following courses of action: (1) submitting his resignation, (2) requesting a discharge, (3) applying for voluntary retirement, and (4) appearing before a board of inquiry (Pet. App. 20a). Petitioner challenged the legality of the show cause order, but elected to appear before a board of inquiry.

Petitioner submitted a list of 30 witnesses whom he wished to have appear before the board. On November 2, 1962, he was advised that the government would not call 22 of the witnesses, but would provide transportation for the remaining eight (Pet. 4).[2] After a two day hearing, the board of inquiry

[2] In his petition in this Court petitioner contends that the 30 witnesses whom he wished to have present had submitted unsworn statements upon which "the Government's case was largely grounded" (Pet. 4). There was no comparable allegation in the complaint, which was before the courts below.

found that petitioner had shown cause for retention in regard to the allegations of personal misconduct and conduct unbecoming an officer, but that he had failed to show cause for retention in regard to the allegations of intentional misrepresentations in official records. The board therefore recommended that he be eliminated from the Army. That recommendation was approved by the Commanding General of the Second Army, and the Under Secretary of the Army, who ordered petitioner's involuntary retirement effective on August 31, 1963.

2. On August 29, 1963, petitioner brought this action in the District Court for the District of Columbia, against the Secretary of the Army, the Under Secretary of the Army, the Adjutant General, the Commanding General of the Second Army, and his commanding officer. He alleged that the statutory provisions for elimination proceedings, 10 U.S.C. 3791–3797, were unconstitutional on their face, that they were unconstitutional as applied to him, that the elimination proceedings were void because they deprived him of the "fair and impartial hearing" required by 10 U.S.C. 3792(b), and that the elimination proceedings would stigmatize him with moral dereliction.[3] He moved immediately for an injunction to restrain the enforcement of 10 U.S.C. 3791, *et seq.*, and to prevent his discharge from active service and asked for the

[3] This allegation suggests that his discharge would be less than honorable. See *Harmon* v. *Brucker*, 355 U.S. 579. Our information is to the contrary. We are advised that persons in the position of petitioner receive an honorable discharge stating that the bearer "served his country honorably and performed his duty faithfully and well." See AR 635–5, ¶5.

convention of a three-judge court. Respondents moved to dismiss on the grounds that (1) the federal courts cannot enjoin the removal or retirement of federal officers,[4] (2) petitioner had not exhausted his administrative remedies,[5] and (3) his action prior to discharge is premature because his post-discharge remedies would be adequate.[6]

The district court denied the motions of both sides. On the motion to convene a three-judge court, the court ruled that petitioner's attacks were aimed primarily at the procedures utilized by the Army, rather than at the statute itself, and that petitioner had "not established that there is a substantial question of constitutional law arising from the language of the statute itself" (Pet. App. 3a–4a). However, relying on 28 U.S.C. 1292(b), *supra*, p. 2, the court certified that its ruling denying the application for a three-judge court "involves a controlling question of law as to which there is substantial ground for difference of opinion", and that an interlocutory appeal "may materially advance the ultimate termination of this litigation" (Pet. App. 6a).

Petitioner applied to the court of appeals for permission to take an interlocutory appeal, and for an injunction pending appeal. After hearing oral argument on the application, the court of appeals (Fahy and Miller, JJ.) denied the application for permission to take the interlocutory appeal, per curiam, and without opinion (Pet. App. 1a). Judge Wright noted a

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[4] *White* v. *Berry*, 171 U.S. 366.

[5] *Reed* v. *Franke*, 297 F. 2d 17 (C.A. 4); compare *Ogden* v. *Zuckert*, 298 F. 2d 312 (C.A.D.C.).

[6] *Beard* v. *Stahr*, 370 U.S. 41.

dissent on the ground that "The attack on the constitutionality of the statute is not plainly frivolous" and that therefore a three-judge court was required (*ibid.*).

ARGUMENT

Congress has vested in the courts of appeals almost complete discretion to determine whether to undertake review of certain interlocutory orders of district courts. It has described the exercise of this discretion as "final" and "ultimate" and has compared it to the exercise of this Court's certiorari jurisdiction. It is not, however, necessary in the present case to decide whether the denial of an interlocutory appeal by a court of appeals is ever reviewable, for there is no doubt that this extremely broad discretion was not abused in the present case. Moreover, the only question presented by this petition—whether the court of appeals has abused its discretion on the particular facts of this case—does not warrant review for it is neither of general importance nor of widespread application.

1. In enacting 28 U.S.C. 1292(b) Congress intended to vest the broadest discretion in the courts of appeals. The extent of this discretion is apparent from the Senate Report accompanying the bill (S. Rep. 2434, 85th Cong., 2d Sess., p. 3):

> The granting of the appeal is also discretionary with the court of appeals which may refuse to entertain such an appeal in much the same manner that the Supreme Court today refuses to entertain applications for writs of certiorari.
>
> It should be made clear that if application for an appeal from an interlocutory order is

> filed with the court of appeals, the court of appeals may deny such an application without specifying the grounds upon which such a denial is based. It could be based upon a view that the question involved was not a controlling issue. It could be denied on the basis that the docket of the circuit court of appeals was such that the appeal could not be entertained for too long a period of time. But, whatever the reason, the ultimate determination concerning the right of appeal is within the discretion of the judges of the appropriate circuit court of appeals.

Thus the Senate Report compares the authority of the courts of appeals to that of this Court in the exercise of its certiorari jurisdiction and indicates that "the *ultimate* determination concerning the right of appeal is within the discretion of the judges of the appropriate circuit court of appeals" (emphasis added). Both the House and Senate Reports also speak of "final discretion" resting in the courts of appeals.[7]

2. But is is unnecessary to decide whether the discretion of the courts of appeals under 28 U.S.C. 1292(b) is wholly unreviewable, for it is clear that there has been no abuse of discretion in the present case. Indeed, petitioner does not contend that the refusal of the court of appeals to entertain the appeal

[7] H. Rep. 1667, 85th Cong., 2d Sess., p. 3; S. Rep. 2434, *supra*, p. 7. The quotation is from a report of the Committee on Appeals from Interlocutory Orders of the District Courts of the Judicial Conference of the United States which drafted the bill which became 28 U.S.C. 1292(b).

was an abuse of discretion (Pet. 8–9).[8] He is of the view that "the interlocutory appeal should be allowed unless it is plainly frivolous" (Pet. 9). Such a standard, which may be pertinent to appeals granted as a matter of right, clearly has no application to interlocutory appeals under 28 U.S.C. 1292(b).

In enacting 28 U.S.C. 1292(b) (Pub. L. 85–919), Congress intended to authorize interlocutory appeals in exceptional cases involving protracted and expensive litigation, where such an appeal might avoid the time and expense of trial. It made it clear that it did not intend to authorize such appeals in ordinary cases.[9] In order to limit the taking of interlocutory appeals to such exceptional circumstances, where a question of law was raised which would be dispositive of protracted litigation, Congress provided that an interlocutory appeal should be entertained only when *both* the district court and the court of appeals were of the opinion that such an appeal would materially advance the termination of the litigation and that it involved an issue of law which might be controlling.[10]

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[8] Nor did the dissenting judge below. He would simply have exercised his discretion differently from the majority (Pet. App. 1a).

[9] H. Rep. 1667, 85th Cong., 2d Sess., p. 2; S. Rep. 2434, 85th Cong., 2d Sess., pp. 2–3, 7. The House report listed, in addition to complex antitrust and conspiracy cases, the following circumstances in which an interlocutory appeal might be appropriate (H. Rep. 1667, *supra*, pp. 1–2): (1) where an accounting remains necessary after liability has been determined; (2) where a long trial remains necessary after a decision overruling a defense going to the right to maintain the action; (3) in cases involving third party defendants which would not be prosecuted without them; and (4) in cases involving transfers.

[10] 28 U.S.C. 1292(b), *supra*, p. 2. H. Rep. 1667, *supra*, p. 2; S. Rep. 2434, *supra*, p. 7.

In the present case the court of appeals could have denied an interlocutory appeal for any of several reasons adequate to sustain the exercise of its extremely broad discretion. It could reasonably have concluded that this case was not the extraordinary kind in which an interlocutory appeal might avoid a protracted and expensive trial. Interlocutory appeals were not intended for routine cases. H. Rep. 1667, *supra*, pp. 1–2. The government urged this consideration in the court of appeals, for this litigation might well be disposed of by summary judgment, on the basis of the administrative record, as is most litigation involving the discharge of federal employees. Again, the court of appeals could reasonably have determined that it was inappropriate to decide whether the constitutionality of the statute was sufficiently drawn in question in this case by the bare complaint, written as it is in largely conclusionary terms.[11] Finally, the court of appeals could have believed that the state of its docket was such that it could not hear and determine the appeal in time materially to advance the termination of this litigation. Any one of these considerations would constitute a sufficient ground for refusing to entertain the interlocutory appeal. S. Rep. 2434, *supra*, p. 3. There is thus no basis for considering the refusal to entertain such an appeal arbitrary or an abuse of discretion.

[11] Petitioner's primary contentions as to his inability to confront or cross-examine 22 hostile witnesses cannot be examined intelligently without knowing whether these witnesses had given evidence adverse to him which was important to the government's case. If the eight witnesses whom the government did offer to produce had supplied all of the important evidence, petitioner could not challenge the constitutionality of the Act on this ground. See n. 2, p. 3, *supra*.

3. Finally, even if there were a substantial question as to whether the court below abused its very broad discretion in denying an interlocutory appeal, Supreme Court review would not be warranted. Petitioner points to no question of general importance or application which arises out of that denial, much less to a conflict between circuits. Pursuant to the Congressional intent that the courts of appeals may refuse to consider such appeals without stated reasons, and in the same way that this Court denies certiorari (S. Rep. 2434, 85th Cong., 2d Sess., p. 3), the court of appeals in the case at bar simply declined to entertain the appeal, without setting forth its reasons. Petitioner does not and cannot assert that the court of appeals applied improper standards in refusing to permit his appeal, but contends only that the court of appeals did not properly exercise its discretion in this case (Pet. 8–9). The application of a court's conceded discretion to the facts and circumstances of a particular case obviously presents no legal issue warranting review by this Court. Such review would be particularly inappropriate in the circumstances of this case, because the order of the court of appeals is interlocutory only, and its sole effect is to postpone appellate review until after a final judgment in the district court. Petitioner is subjected to no substantial harm by being required to await such a final judgment.[12] In these circumstances there is no reason

[12] It is now settled that an army officer contesting his removal from active service has adequate post-removal remedies. *Beard v. Stahr*, 370 U.S. 41, 42. But if petitioner believed that his dismissal would lead to irreparable injury, and that his post-removal remedies were inadequate, he could have pressed his motion for a preliminary injunction. Appeal from the denial

for this Court to depart from its usual practice of refusing to review interlocutory orders. *American Construction Co.* v. *Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384; Stern and Gressman, *Supreme Court Practice* (2d ed., 1954), p. 130.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.[13]

ARCHIBALD COX,
Solicitor General.
JOHN W. DOUGLAS,
Assistant Attorney General.
MORTON HOLLANDER,
DAVID L. ROSE,
Attorneys.

NOVEMBER 1963.

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of a preliminary injunction is, of course, a matter of right. 28 U.S.C. 1292(a)(1).

[13] Although we believe that the issue of the substantiality of petitioner's claim for an injunction based upon the unconstitutionality of 10 U.S.C. 3791–3797 is not before this Court, we submit that there is, in any event, no substantial doubt in this regard. First, an injunction is not warranted because petitioner's post-retirement remedies are adequate. *Beard* v. *Stahr*, 376 U.S. 41, 42. Beyond this, at least when an officer is given an honorable discharge, the constitution permits the burden of rebutting charges of specific misconduct to be placed on the officer. Cf. *Reaves* v. *Ainsworth*, 219 U.S. 296, 304–306; *Cleary* v. *Weeks*, 259 U.S. 336; *Vitarelli* v. *Seaton*, 359 U.S. 535, 539; *Cafeteria & Restaurant Workers' Union* v. *McElroy*, 367 U.S. 886, 896–898. Finally, petitioner's conclusionary claim of denial of a right to confront his accusers does not constitute an attack on the statute but merely on the way it was applied by the Army in this case. The district court may determine at trial that the statute itself grants petitioner the very rights he seeks.

U. S. GOVERNMENT PRINTING OFFICE 1963